road, but he relied on the case of *Dennis v. White*[11]. I do not think he can. In that case the workman was ordered by his employer to go on a bicycle to fetch something, and in his journey he met with an accident. In this appeal the deceased was not obliged to travel in the lorry. I think the category of the road is important.

The road was used by the Public Works Department solely for quarrying. It happened to be taken over by a public department; such a road could have been constructed by any commercial firm wanting stone. Does the fact that it was taken over by the Public Works Department make it a public highway? Mr. Boyle describe it a quarry road. I have seen it, and do not think it could *now* be so described. It is a road leading from the highway to the New Labu Estate labourers' lines. It was never dedicated to public use.

I can find no authority, nor could Counsel assist me, on the categories of such lanes. I do not think there is any obligation on the part of Government to maintain such a road, on the other hand if it was once a public highway it must always so remain, it cannot lose it's status to the Estate by any prescriptive right of user by the latter.

I have had to go back to the times of King Charles II in the endeavour to answer the conundrum. In *Katherine Austin's*[12] *Case* it states :—

> Upon a trial at Bar, the principal question was, whether the place where the obstruction was, were an highway?
>
> Hale said, If a way lead to a market, and were a way for all travellers, and did communicate with a great road, &c. it is an highway; but if it lead only to a church, to a private house or village, or to fields, there it is a private way. But 'tis a matter of fact, and much depends upon common reputation. If it be a public way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom. Private ways are to be repaired by the village or hamlet, or sometimes by a particular person.

It seems to me that the road cannot be regarded as a public road. No one on viewing it would so describe it. It's present utilised purpose is to proceed to and from the main road and the Estate labourers' lines. The Estate maintain it (record page 10) and only those working on or having business with the Estate pass along it.

I cannot accede to the principle that a road in Malaya because it is on State property must *ipso facto* be a public road. Many roads leading to places of public utilities or services pass over State land, but could not be held to be public roads or highways for all to use. Some, indisputably on State land, lead to official residences, others to public institutions; they are not highways. I do not believe the public had ever a right of way over this lane, using the term "public right of way" in the generally accepted construction. For all practical purposes the lane on which the accident occurred was an estate road running as it does through the employer's plantation. Had there not been the point of the status of the road on which the accident happened, then I think the case of *Howells v. Great Western Railway*[13] affords full authorities in support of the finding of the Court below, and in my view it would be wrong to hold against the principles therein enunciated because only of the question of this road claimed by the appellants to have the standing of a public highway. I cannot regard it as such.

Therefore, though not quite by the same route, I arrive at the same conclusion as the learned Commissioner in the Court below.

The appeal is dismissed with costs in favour of the applicant-respondents.

Appeal dismissed.

LIM AH TONG v. PUBLIC PROSECUTOR.

[C. A. (Spenser Wilkinson, Russell, and Briggs JJ.) November 20, 1948]

[K. L. — F.M. Criminal Appeal No. 133 of 1948]

Criminal law — Possession of arms — Carrying arms — Onus of proof that firearm is unlicensed — Defence of duress — Penal Code, s. 94 — Evidence Enactment, s. 106(b) — Emergency Regulations, 1948, reg. 4(1)(a).

This was an appeal against the conviction of the appellant for being in possession of a revolver an offence punishable under reg. 4(1)(a) of the Emergency Regulations. The evidence showed that the accused was carrying the revolver.

Held: (1) it is desirable where the offence is clearly one of carrying arms, to charge it as such, as both the evidence required to prove the offence of carrying arms and the law relating thereto are simpler than in a case of carrying arms, and therefore to charge a person who has carried arms with possession of them unnecessarily increases the difficulties of the Assessors and the trial Judge in trying a capital charge; (2) all the general exceptions set out in Chapter IV of the Penal Code apply to offences under the Emergency Regulations and that the learned trial Judge was therefore wrong in saying in his summing up that section 94 of the Penal Code which defines the defence of duress does not apply to an offence under the Emergency Regulations; (3) in a charge dealing with unlicensed firearms the duty of the prosecution is to give *prima facie* evidence that the firearm in the possession of the accused is unlicensed and it is then for the accused to show if this be the fact, that he is licensed.

Case referred to :—

(1) *R. v. Oliver* 29 Cr. App. R. 137.

CRIMINAL APPEAL.

P. C. Au Yong for the appellant.

F. G. Cooke (D. P. P.) for the respondent.

The judgment of the Court of Appeal was delivered by :—

Spenser Wilkinson J. : — In this case the appellant was charged with possession of a .38 revolver, an offence punishable under Regulation 4(1) (a) of the Emergency Regulations, 1948. Both the Assessors expressed the opinion that the appellant was guilty; the learned trial Judge agreed with these opinions and the appellant was accordingly convicted and sentenced to death. At the conclusion of the hearing we dismissed the appeal and announced that we would give our reasons later which we now proceed to do.

The first comment we desire to make is in regard to the charge. The story of the prosecution witnesses, if true, clearly disclosed a case of carrying arms. The legislature has made it equally an offence to carry, to possess or to have control of arms or ammunition; but in view of the fact that all such cases have to be tried by a Judge with the aid of Assessors we are of opinion that it is very desirable, where the offence is clearly carrying, to charge it as such. Both tht evidence required to prove the offence of carrying and the law relating thereto are simpler than in a case of possession and, to charge a person who has carried arms with possession of them, unnecessarily increase the difficulties of the Assessors and the trial Judge in trying a capital charge.

The next point to which we must draw attention is the remark in the summing up of the learned trial Judge to the effect that section 94 of the Penal Code does not apply to an offence under the Emergency Regulations. This is not correct. Section 40 of the Penal Code lays down that in Chapter IV of that Code, which is the chapter relating to General Exceptions and includes section 94, the word "offence" denotes a thing punishable under the Code or under any other law for the time being in force. So that all the General Exceptions apply to offences under the Emergency Regulations. The learned trial Judge did, however, go on to direct the Assessors upon the question of duress as fully as he could have done had he considered section 94 applicable. We were of opinion therefore that this slip in the summing up in no way prejudiced the appellant.

Finally, there is one respect in which the learned trial Judge's summing up was rather too favourable to the appellant. He stated that the prosecution must prove that the firearm, which was in the possession of the accused, was unlicensed and that he had no licence to possess it. We think this puts the matter too strongly. The prosecution should give *prima facie* evidence that a firearm in the possession of an accused is unlicensed; but if the accused in fact had a licence this is a matter as much within his own knowledge as the possession of a railway ticket would be in the circumstances described in Illustration (b) to section 106 of the Evidence Enactment and it is therefore for the accused to show, if this be the fact, that he is licensed. (See *Rex v. Oliver*[1]).

Although we have thought it right to express our views upon the above three matters, it is clear in our view that none of them detracts in any way from the propriety of the conviction in this case. There was ample evidence upon which the Assessors and the learned trial Judge could find the appellant guilty and there was no material misdirection. In any event we were satisfied that the Assessors must have arrived at the same conclusion. The appeal was therefore dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. NG TICK CHUAN

[A. Cr. J. (Spenser Wilkinson J.) August 5, 1947]

[K. L. — Criminal Miscellaneous Application No. 16 of 1947]

Criminal Procedure Code (Cap. 6), ss. 294, 295 and 426 — Binding over under s. 294 — Whether punishment.

Binding over under section 294 of the Criminal Procedure Code (Cap. 6) is not a punishment because this section provides that the Court may release an accused person upon a bond "instead of sentencing him at once to any punishment." Moreover, one of the conditions in the bond is to appear and receive judgment if and when called upon and it would be on this occasion that any punishment would be awarded.

[**Editorial Note**: Since this decision section 426 of the Criminal Procedure Code (Cap. 6) has been amended by Ordnance No. 8 of 1954 by deleting the words "in addition to any other punishment" and therefore the case is no more law as far as it concerns the present section 426 of the Criminal Procedure Code.]

REVISION.

Spenser Wilkinson J. : — Having considered the record in this case on revision I have come to the conclusion that that part of the learned District Judge's order which purports to have been made under section 426 of the Criminal Procedure Code is erroneous in two respects. In the first place, I can find no provision in that section for an order for payment into Court. The section provides for payment by an accused to any person injured by the offence, and sub-section (ii) of the same section lays down that the Court shall specify the person to whom compensation is to be made. Secondly the section appears to contemplate